

## Fair Political Practices Commission

### MEMORANDUM

**TO:** Chairman Getman, Commissioners Downey, Knox, and Swanson

**FROM:** Steven Benito Russo, Chief of Enforcement  
Alan Herndon, Chief Investigator

**DATE:** March 28, 2002

**SUBJECT:** Streamlined Enforcement Program for Late Contribution Reporting Violations  
2002 Election Cycle

#### Introduction

At the June 2, 2000 Commission meeting, the Commission approved a *Streamlined Enforcement Program* (hereinafter the “*Program*”) to proactively identify and prosecute late contribution reporting violations in connection with State elections. During the past two years, the Commission has approved sixty-four (64) settlements that resulted from the *Program*, with administrative penalties totaling \$145,834. With the 2002 election cycle in full swing, we are proposing that the Commission revisit the *Program*, to determine whether the *Program* should be continued, and if so, what modifications should be made to the *Program*, if any.

#### Program Summary

With the assistance of the Secretary of State’s office, for the 2000 election cycle, we were able to obtain an electronic spreadsheet containing all of the late contribution reports filed in connection with the 2000 elections, along with photocopies of the original late contribution reports that were filed. With this information, we were able to compare reports filed by recipients with those filed by contributors, to identify reporting discrepancies that may constitute violations of section 84203 of the Political Reform Act.<sup>1</sup> Once discrepancies were identified, with exceptions in a few individual cases, we initiated contact with the potential respondents, in accordance with the Commission’s *Program*, as follows:

- A cumulative total of unreported late contributions of \$10,000 was the minimum threshold for contact (unreported amounts totaling \$50,000 or more received a secondary review by the Chief Investigator and the Chief of Enforcement);

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<sup>1</sup> The Political Reform Act is contained in sections 81000 through 91014 of the Government Code. All statutory references are to the Government Code unless otherwise indicated. The regulations of the Fair Political Practices Commission, enacted pursuant to the provisions of the Act, are contained in sections 18000, *et seq.*, of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated

- No further investigation, including interviews, was conducted;
- No mitigating or aggravating information was considered;
- A one page *Stipulation, Decision and Order*, with an attachment, was utilized for processing settlements (see Exhibit I);
- A penalty equal to 15% of the unreported late contributions, subject to the statutory maximum administrative penalty of \$2,000 per violation, was imposed (violations occurring in the general election for which a respondent had been prosecuted for primary election violations were assessed a penalty equal to 25% of the unreported late contribution, up to the statutory maximum);
- Missing late contribution reports were not required to be filed as a condition of settlement.

Any respondent who failed to respond to our contact, or declined to participate in the *Program*, was prosecuted through the normal administrative enforcement process (probable cause report, probable cause conference, accusation and administrative hearing). With respect to the violations identified and prosecuted in connection with the March 7, 2000 primary election, 85 % elected to utilize the *Program* as the method for resolution of their cases. The *Program* was administered by one member of the investigative staff, Jon Wroten, for the March 2000 election. It consumed approximately 413 hours of his time.

After the *Program* was instituted in connection with the March 7, 2000 primary election, the number of late contribution reporting violations that occurred in connection with the subsequent November 7, 2000 general election was significantly less than had occurred in the primary election. This is a strong indicator of the deterrent effect of the *Program*, prompted by the *Program's* ability to identify and address violations quickly and efficiently.

### **Continuation of the *Program***

Given the large number of cases successfully prosecuted through the *Program*, with a minimal amount of staff resources, and the overall ease in processing those cases, staff is strongly recommending continuation of the *Program* for the 2002 election cycle. In addition, except for the exclusion criteria and the penalty structure discussed below, staff also recommends that the basic parameters of the *Program*, as outlined above, remain unchanged.

*Action Requested: The Commission approve continuation of the Streamlined Enforcement Program for prosecuting proactively identified late contribution reporting violations, using a \$10,000 minimum threshold for prosecution, and not requiring missing late contribution reports to be filed as a condition of settlement.*

### **Criteria For Excluding Cases from the Streamlined Enforcement Program**

Throughout the two year history of the *Program*, the Enforcement Division has retained prosecutorial discretion to exclude from the *Program* any case that Enforcement Division staff felt to be inappropriate for handling through the *Program*, due to the particular circumstances of the case. Cases excluded from the program have been investigated in the same manner as other cases not included in the *Program*, and resolved without regard to the standardized penalty structure adopted for the *Program*.

Within that broad grant of prosecutorial discretion, the Commission has previously directed Enforcement Division staff to specifically examine any case in which a violator has failed to report \$50,000 or more in late contributions, and to determine whether it is appropriate to process the case through the *Program*. In response to that direction, the Enforcement Division has instituted a procedure of evaluating each such case before processing it through the *Program*, and routinely excludes such cases from the *Program* unless the Chief of Enforcement determines that under the specific facts of the case it is appropriate to include the case in the *Program*.

Of course, the mere size of a violator's unreported late contribution activity should not be the only basis for excluding a case from the *Program*. Regulation 18361, subdivision (e)(4) sets forth a list of criteria that should be considered by either the Commission or an administrative law judge in the evaluation of a case. Borrowing from this list, the Enforcement Division proposes using the following criteria for excluding a case from the *Program*:

1. There is evidence that the violator had an intention to conceal, deceive, or mislead;
2. There is evidence that the violation was deliberate;
3. The violator is currently being investigated or prosecuted for one or more other violations of the Political Reform Act;
4. The violator has previously been prosecuted for one or more other violations of the Political Reform Act;
5. The amount of the unreported late contribution(s) are such that application of the *Program*'s standardized penalty structure to the particular case would result in an injustice;
6. The violator has declined an invitation to participate in the *Program*; or
7. The overall circumstances of the case are such that application of the *Program*'s standardized penalty structure to the particular case would result in an injustice.

*Action Requested: The Commission reaffirm its previous grant of discretion to the Enforcement Division to exclude cases from the Streamlined Enforcement Program, and adopt the above list of criteria for excluding cases from the Program.*

### **Penalty Structure**

If the Commission adopts the exclusion criteria listed above, the cases left in the *Program* would only be the more “typical” late contribution reporting cases that involve negligent or inadvertent violations, by violators who have no pattern or history of violating the Act, and whose unreported contributions, in most instances, total less than \$50,000. In approving a standardized penalty structure for the *Program*, the Commission is declaring what it considers to be an appropriate penalty for these cases, based on the seriousness of late contribution reporting violations generally, and taking into account that violators, by participating in the *Program*, are admitting their culpability at an early stage. Implicit in such a declaration, however, is that violators who do not avail themselves of the *Program*, absent significant mitigating factors, would be deserving of an even higher penalty than is being imposed through the *Program*.

When the Commission discussed the *Program* on June 2, 2000, considerable time was spent developing the penalty structure. Essentially, the Commission considered two primary options: 1) assessing a penalty based on a percentage of the late contribution amount not reported, but subject to the statutory administrative maximum penalty of \$2,000 per violation, or; 2) assessing a fixed penalty amount per violation, without regard to the amount of late contributions not properly reported. Although it was clearly recognized that there were equity problems with both options, the Commission ultimately approved a penalty structure based on 15% of the unreported late contribution amounts, subject to the statutory maximum, as the most equitable. As outlined above, this was the penalty structure utilized for prosecuting violations that related to the 2000 election cycle.

As you are aware, with the passage of Proposition 34, the maximum administrative penalty has been increased from \$2,000 per violation to \$5,000 per violation. As a result, we believe that the Commission should re-examine the *Program’s* penalty structure, as it relates to the 2002 election cycle, and consider several options.

#### *Option 1 – Retain the Existing Penalty Structure*

This option would create a uniform penalty structure based on 15% of the unreported late contribution amounts, subject to the new statutory administrative penalty maximum of \$5,000 per

violation.<sup>2</sup> Although this option may seem severe at first blush, strong arguments exist for

this option. First, this option would continue to recognize the importance of late contribution reporting in the overall campaign disclosure reporting scheme. This reporting is required to occur during the sixteen day period immediately preceding an election, when large, last minute contributions are made and received. Although contributions to candidates for the State Legislature are now limited by Proposition 34, the amount of contributions that can be made to candidates for statewide office and ballot measures is virtually unlimited for the 2002 election cycle. Second, the existing penalty structure would still produce reasonable results. Under the old statutory maximum of \$2,000 per violation, a single unreported late contribution of \$13,333 was required before the maximum penalty was imposed. However, under the new statutory maximum of \$5,000 per violation, a single unreported late contribution of \$33,333 would be required before the maximum penalty is imposed. Very simply, it does not seem unreasonable that an unreported late contribution of \$33,333 or more should trigger the maximum statutory penalty of \$5,000. By adopting this option, the Commission would be saying that failing to report a large late contribution is such a serious violation that the seriousness of the violation outweighs any other factors that may be considered in determining what administrative penalty should be imposed.

In analyzing the sixty-four (64) cases that were prosecuted under the existing *Streamlined Enforcement Program*, we observed that the penalty in thirty-five (35) of the cases would remain unchanged using this option, because each of the cases involved a single unreported late contribution that was less than \$13,333. In another eighteen (18) of the cases, the penalty would have increased under this option, but the total would still have been less than the \$5,000 maximum per violation. In only eleven (11) of the cases, where a single late contribution of \$33,333 or more was unreported, would the penalty have amounted to the maximum of \$5,000 per violation using this option.

#### *Option 2 – A Fixed Amount Per Violation*

This option would assess a fixed penalty amount for each violation, regardless of the amount of the undisclosed late contributions. In essence, this option is viable if you consider every late contribution of equal value, and you conclude that every violation should receive the same penalty. During the Commission's discussion on June 2, 2000, a penalty amount of \$1,250 per violation was considered, when compared to a statutory maximum of \$2,000 per violation. For illustration purposes we have used \$3,125, which bears the same proportion to the new maximum of \$5,000 per violation as \$1,250 did to the old maximum. However, the Commission in June 2000 rejected this option, because the penalty amount appeared arbitrary, and gave no consideration to the amounts of the unreported late

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<sup>2</sup> The number of violations committed is determined by the number of contributions not properly reported, as opposed to the number of late contribution reports not filed.

*Option 3 – The Existing Penalty Structure with a Cap*

This option would impose a penalty based on a percentage of the unreported late contributions, currently at 15%, but would also impose a cap per violation of less than the statutory maximum of \$5,000. In recognition of the seriousness of late contribution reporting violations, we propose that the cap would be set, under this option, at \$3,500 per violation. Like *Option 1*, this option recognizes the importance of late contribution reporting, and that the public harm from non-reporting increases as the amount of the unreported contributions increases. In contrast to *Option 1*, however, this option would impose a cap per violation, so that penalties in the range of \$3,500 to \$5,000 per violation would be reserved for the cases that are too serious to be included within the *Program*, but are still prosecuted administratively rather than civilly.

*Option 4 – A Fixed Penalty, or a Percentage Penalty with a Cap, Plus an Enhancement*

This option would utilize the concepts in either *Option 2* or *Option 3*, but would also include an “enhancement penalty” for contributors of large amounts or large numbers of contributions. The “enhancement penalty” concept was approved by the Commission on August 3, 2001 for imposing penalties on non-filing major donor committees. The “enhancement penalty” amount is one percent (1%) of the amount contributed, and is imposed only on major donor committees that have made contributions of \$50,000 or more, or have made ten (10) or more contributions. Of course, the total penalty (base penalty plus “enhancement”) could not exceed the statutory maximum of \$5,000 per violation.

To illustrate how this option would be applied, initially a base penalty amount would be imposed using the concepts in *Option 2 (A Fixed Amount Per Violation)* or *Option 3 (Existing Penalty Structure with a Cap)* and the “enhancement penalty” would be added to the base penalty amount for committees with unreported large contributions or an unreported high volume of contributions. For example, assume a committee made two late contributions totaling \$60,000, and failed to report them. Under *Option 2*, the base penalty amount would be \$6,250 (two counts at \$3,125 each) and under *Option 3*, the base penalty amount would be \$7,000 (15% of the unreported amount, but limited to \$3,500 per count). In both cases, an additional penalty of \$600 (1% of the unreported amount) would be added to the base penalty, because the unreported contributions exceeded \$50,000 (assuming the Commission would use the same criteria for imposing the “enhancement penalty” as were used for non-filing major donor committees).

*Comparison of Options 1, 2, 3 and 4*

| # of Late Contributions Unreported | Total Dollars Unreported | Option 1 | Option 2 | Option 3 | Option 4             |
|------------------------------------|--------------------------|----------|----------|----------|----------------------|
| 1                                  | \$30,000                 | \$4,500  | \$3,125  | \$3,500  | Same as 2 and 3      |
| 1                                  | \$15,000                 | \$2,250  | \$3,125  | \$2,250  | Same as 2 and 3      |
| 4                                  | \$10,500                 | \$1,575  | \$12,500 | \$1,575  | Same as 2 and 3      |
| 6                                  | \$145,000                | \$21,750 | \$18,750 | \$21,000 | \$20,200 or \$22,450 |
| 11                                 | \$40,000                 | \$6,000  | \$34,375 | \$6,000  | \$34,775 or \$6,400  |

*Enforcement Division Recommendation*

The Enforcement Division recommends adoption of either *Option 1 (Retain the Existing Penalty Structure)* or *Option 3 (The Existing Penalty Structure with a Cap)*.

By retaining the existing penalty structure, the Commission would be emphasizing the importance of late contribution reporting, and assuring that with the increase in public harm that accompanies an increase in the amount of unreported late contributions, the penalty imposed for non-reporting would consistently increase up to the statutory maximum. Again, in order for the maximum statutory administrative penalty of \$5,000 per violation to be reached, a single unreported contribution of \$33,333 or more would be required. By adopting this option, the Commission would be saying that whenever such a large late contribution is intentionally or negligently not reported, that reporting violation deserves a maximum penalty, regardless of any other factors that may be considered.

Alternatively, by retaining the existing penalty structure, with a cap of \$3,500 per violation, the Commission would be allowing the penalty imposed under the *Program* to increase with the amount of the contributions that are not reported, but not to the point where cases resolved under the *Program* are penalized at the same level as cases excluded from the *Program*. This option would therefore build into the *Program* a greater incentive for violators to quickly resolve their cases through the *Program*, as they could face higher penalties if they do not. It would also reserve higher penalties than those imposed under the *Program* for those cases that are so aggravated that they are excluded from the *Program*. As such, the penalties of more than \$3,500 per count would be expressly reserved for those cases that are either particularly egregious, or in which the violator, despite failing to report a large late contribution, refused to admit culpability at any early stage by participating in the *Program*.

*Action Requested: The Commission approve a penalty structure for prosecuting late*

*contribution violations in the 'Streamlined Enforcement Program', using Options 1 or 3, described above.*

### **Use of the One Page *Stipulation, Decision and Order* for Non-Proactive Cases**

During the past two years, we have encountered a few cases that originated from a non-proactive source, that exclusively involved late contribution reporting violations. The most common origin of these cases has been the reports issued by the Franchise Tax Board at the completion of their statutorily mandated audits. We believe that the one page “*Stipulation, Decision and Order*” format (see Exhibit I) that the Commission approved for use in prosecuting violations that originated through the proactive *Program*, is appropriate for use in some cases that did not originate through the *Program*. In summary, we would like to have the discretion to use the one page *Stipulation, Decision and Order* format for resolving cases that only involve late contribution violations, and are factually similar to the proactively prosecuted cases.

*Action Requested: The Commission approve the use of the one page “Stipulation, Decision and Order” format, at the discretion of the Enforcement Division, for cases that only involve late contribution reporting violations.*